STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY S. GRAMER, Plaintiff-Appellee,	UNPUBLISHED July 1, 2003
v	No. 237519 Oakland Circuit Court
MALAN REALTY INVESTORS, INC., Defendant-Appellant.	LC No. 00-027385-CZ

Before: Griffin, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment awarding plaintiff $1,043,688.50, plus interest and costs. The judgment was entered following the trial court's grant of summary disposition to plaintiff, defendant's former president and chief executive officer, on plaintiff's claim for breach of his employment contract, and on defendant's counterclaims for breach of contract and fiduciary duty, conversion, restitution, and unjust enrichment. We affirm.

I

After defendant became a publicly traded corporation in 1994, the parties entered into a written employment agreement that provided an initial two-year term of employment for plaintiff and required plaintiff to "apply on a full-time basis (allowing for usual vacations and sick leave) all of his skill and experience to the performance of his duties in such employment." Paragraph 4 of the agreement also provided that if plaintiff's employment was terminated by defendant for any reason other than cause or plaintiff's death or disability before the term of employment was completed, plaintiff was entitled to receive his base salary for the greater of the remaining term of employment or one year.[1]

On August 15, 1997, the parties amended the employment agreement to add paragraphs 17 and 18. Paragraph 17(a) provided that, if a "change in control" occurred during plaintiff's

[1] Paragraph 4 defines termination for cause as "termination by action of the Board of Directors of the Company because of the failure of Executive to fulfill his obligations under this Agreement or because of serious willful misconduct by Executive in respect of his obligations under this Agreement, as, for example, the commission by Executive of a felony or the perpetration by Executive of a common-law fraud against the Company."

term of employment, plaintiff would be entitled to receive $1 million in a lump sum payment, to be paid within five business days of the change. This payment was in addition to any salary and compensation to which plaintiff was entitled and was not contingent upon plaintiff's termination of employment following a change in control. Paragraph 17(b) provided that "[t]he payment provided under this paragraph 17 shall be reduced by any payments to which Executive may be entitled under paragraph 4 of the Employment Agreement regarding a termination of employment." A second amendment to the employment agreement was executed on December 15, 1999, whereby plaintiff's term of employment was changed to a period of four years beginning January 1, 2000, and ending December 31, 2003.

The parties agree that, in May 2000, a change in control occurred after a proxy fight resulted in a new board of directors. Plaintiff and two other executives received lump sum change in control payments, and the new board of directors announced through a press release that plaintiff would be retained as president and chief executive officer. Nonetheless, on July 17, 2000, plaintiff was notified by letter that his employment was being terminated. No reason for the action was given, and plaintiff was only paid his salary through July 31, 2000. Plaintiff commenced the instant action, arguing that he was entitled to receive his full salary through December 31, 2003, and alleging breach of the employment agreement.

Defendant filed a countercomplaint, arguing that plaintiff had breached his fiduciary duties and contractual obligations by (1) accepting his annual salary, stock options, and benefits while failing to devote his full time and attention to his duties; (2) disregarding a public announcement that Prudential Securities had been engaged to explore the full range of property and capital markets strategies available to defendant, and instead prohibiting Prudential from exploring the possible sale of the corporation; (3) paying his personal secretary from the corporation's assets for personal services well in excess of her peers; and (4) engaging in ultra vires conduct by making unauthorized change in control payments from corporation assets to himself and two other executives. Defendant alleged claims of conversion, restitution, unjust enrichment, and breach of contract and fiduciary duty.

Plaintiff filed a motion for summary disposition of his complaint and defendant's countercomplaint, pursuant to MCR 2.116(C)(8) and (C)(10), which was granted by the trial court. The court denied defendant's motions for rehearing and for leave to amend its affirmative defenses in answer to plaintiff's complaint and its countercomplaint.

II

Defendant first argues that the trial court erred in granting summary disposition, pursuant to MCR 2.116(C)(8), on its counterclaim for conversion. We disagree. We review a grant of summary disposition based upon a failure to state a claim de novo on appeal. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997); *Trost v Buckstop Lure Co*, 249 Mich App 580, 583; 644 NW2d 54 (2002). Summary disposition against a claim may be granted on the ground that the opposing party has failed to state a claim on which relief can be granted. MCR 2.116(C)(8), *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001); *Ormsby v Capital Welding, Inc*, 255 Mich App 165, 172-173; 660 NW2d 730 (2003). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions which can be

drawn from the facts, and construed in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Alan Custom Homes, Inc v Krol*, ___ Mich App ___; ___ NW2d ___ (Docket No. 237138, issued 5/8/03) slip op p 2.

The common law tort of conversion is defined as "any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999), quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). "The gist of conversion is the interference with control of the property." *Sarver v Detroit Edison Co*, 225 Mich App 580, 585; 571 NW2d 759 (1997), quoting Prosser & Keeton, Torts (5th ed), § 15, p 102. To support an action for conversion of money, there must be an obligation to return the specific money entrusted to the party's care. *Head*, *supra* at 94, citing *Check Reporting Services, Inc v Michigan Nat'l Bank-Lansing*, 191 Mich App 614, 626; 478 NW2d 893 (1991); see also *Anderson v Reeve*, 352 Mich 65, 69-70; 88 NW2d 549 (1958). In contrast to the common law tort of conversion, statutory conversion "consists of knowingly 'buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property.'" *Head*, *supra* at 111, quoting MCL 600.2919a.

Defendant contends that plaintiff "knowingly misappropriated" corporation assets by making "unauthorized" change in control payments; paying himself salary, bonuses, stock options, and other benefits when he "knew" that he had not devoted his full time and attention or exerted his best efforts in the performance of his duties and responsibilities as president and chief executive officer; and by making similar payments to his secretary "as consideration for personal services provided by her to him rather than work performed by her for or on behalf" of the corporation. Defendant argues that these allegations were sufficient to state a claim for both common law and statutory conversion. Additionally, defendant argues that, although the trial court purported to grant summary disposition pursuant to MCR 2.116(C)(8), the court considered evidence outside the pleadings, and therefore, committed error requiring reversal. Defendant maintains that, even if this Court reviews the matter pursuant to MCR 2.116(C)(10), reversal is still required because it was deprived of all discovery, plaintiff's motion was premature, and the affidavits of Paul Gray, the current chairman of its board of directors, and Raymond Carey, its attorney, established an evidentiary basis for the claim.

We conclude, upon a de novo review, that defendant failed to state a claim for common law conversion because it did not allege that plaintiff wrongfully exerted dominion over any property in denial of, or inconsistent with, the corporation's rights. Plaintiff exerted dominion over the corporation's property pursuant to his own employment agreement, the employment agreements of two other executives, and the ratification by the corporation's former board of directors of salary and benefits paid to plaintiff and his secretary. Therefore, these actions were not in denial of, or inconsistent with, the corporation's rights. In addition, defendant did not allege that plaintiff had any obligation to return the exact money received in salary or the change in control payment, and therefore, as the trial court correctly found, defendant failed to state a claim for conversion of that money. *Anderson*, *supra* at 69-70; *Head*, *supra* at 94. Regarding stock options and other noncash benefits given to plaintiff or plaintiff's secretary, the corporation's former board approved plaintiff's employment agreements and all payments to employees. Although defendant argues that members of the former board, which consisted of plaintiff and four outside directors, were not disinterested in these transactions, defendant does

not allege how any of the former directors, other than plaintiff, had a financial interest in plaintiff's employment agreements and compensation or the compensation of plaintiff's secretary.

Furthermore, pursuant to MCL 450.1545a(4), the actions of the former board in approving plaintiff's compensation, as an officer of the corporation, are not subject to challenge "unless it is shown that the compensation was unreasonable at the time established." Defendant does not challenge the amount of plaintiff's compensation, but argues that he did not perform his duties under his employment agreement and was not entitled both to his salary and the change in control payment. These are matters pertaining to the interpretation of plaintiff's employment agreement, not the tort of conversion. Therefore, upon a de novo review, we find that defendant has not stated a claim for common law conversion.

Defendant also argues that it stated a claim for statutory conversion. We find, upon a de novo review, that because defendant did not allege that plaintiff participated in "buying, receiving, or aiding in the concealment of any . . . converted property," defendant also failed to state a claim for statutory conversion. Thus, the trial court did not err in granting summary disposition to plaintiff on defendant's counterclaim for conversion pursuant to MCL 2.116(C)(8).

III

Defendant next argues that the trial court erred in granting summary disposition on its counterclaims for restitution and unjust enrichment. We disagree. For both of these claims, defendant sought the return of the $1 million change in control payment that plaintiff received. The trial court determined that there was a valid employment agreement, as amended, which provided for the change in control payment and other financial obligations at issue, and the issue of whether the payments were proper must be determined by the agreement and amendments. On appeal, defendant, once again, contends that there was no provision in the employment agreement regarding plaintiff's financial obligation to reimburse the corporation for unauthorized change in control payments and the other financial benefits at issue, and therefore, the trial court erred in finding that these payments were covered by the employment agreement and granting summary disposition on the claims for restitution and unjust enrichment.

Michigan courts recognize the equitable right of restitution when a person has been unjustly enriched at the expense of another. *Michigan Educ Employees Mut Ins Co v Morris*, 460 Mich 180, 198; 596 NW2d 142 (1999). "The elements of a claim for unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). In such circumstances, the law will imply a contract to prevent the unjust enrichment of the defendant. *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 185-186; 504 NW2d 635 (1993). "[A] contract will be implied only if there is no express contract covering the same subject matter." *Barber*, *supra* at 375.

The trial court did not err in determining that there was an express contract governing plaintiff's compensation from the corporation, including the change in control payments. Defendant's argument that there are no provisions contained in plaintiff's employment agreement that obligate plaintiff to reimburse the corporation for payments wrongfully made is without merit. The employment agreement and its amendments authorize the payments to

plaintiff under the stated conditions. Although the change in control payments made by plaintiff, as the corporation's president and chief executive officer, to two other officers and other payments made to plaintiff's secretary are not covered in the express agreement at issue, these payments were ratified by disinterested directors on defendant corporation's board. Moreover, defendant did not allege that plaintiff himself was enriched, unjustly or not, by payments to other employees. Upon a de novo review, we find that the trial court did not err in granting summary disposition to plaintiff pursuant to MCR 2.116(C)(8) on these claims for restitution and unjust enrichment.

IV

Defendant next argues that the trial court erred in granting summary disposition, pursuant to MCR 2.116(C)(10), on plaintiff's claim for breach of contract and defendant's counterclaims for breach of contract and fiduciary duties. We disagree. On appeal, we review de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Mino v Clio School District*, 255 Mich App 60, 67; 661 NW2d 586 (2003). This Court must review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998); *Michigan Educational Employees Mutual Ins Co v Turow*, 242 Mich App 112, 114-115; 617 NW2d 725 (2000). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek, supra* at 337; *Mino, supra* at 67. When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

In his complaint, plaintiff maintained that his employment was terminated without cause, and therefore, under the terms of the employment agreement, defendant was obligated to pay his full base salary through December 31, 2003. In its counterclaim, defendant alleged that plaintiff failed to devote his full time and attention to the corporation's business; that he failed to comply with instructions from the new chairman of the board not to make change in control payments to himself and two other executives; and that his payment of salary, bonuses, stock options, and other benefits to himself and his secretary all were breaches of his employment agreement and his fiduciary duties to defendant.

In granting plaintiff's motion for summary disposition, the trial court noted that defendant should have some evidence to support the allegations in its counterclaim that plaintiff was terminated for cause and breached fiduciary duties. However, in its response to plaintiff's motion for summary disposition, defendant presented no documentary evidence or affidavits, contrary to MCR 2.116(G)(4). The trial court determined that an express agreement governed the employment relationship between the parties, the agreement was clear and unambiguous, and it provided for the compensation sought by plaintiff, as well as the change in control payment. While plaintiff may have had fiduciary obligations not stated in the employment agreement, defendant failed to plead the statutory violations when it filed its counterclaim and failed to present any evidence that a fiduciary duty was breached or that any payments were improperly made, because defendant's former board of directors approved all financial transactions at issue. Defendant also provided no evidence that plaintiff did not devote his full time and attention to his duties.

Defendant contends that the trial court erred in granting summary disposition on the breach of contract and fiduciary duty claims because it was not allowed any discovery. A motion under MCR 2.116(C)(10) is generally premature if discovery has not closed, unless there is no fair likelihood that further discovery would yield support for the nonmoving party's position. *Townsend v Chase Manhattan Mortgage Corp*, 254 Mich App 133, 140; 657 NW2d 741 (2002). However, summary disposition before the close of discovery is appropriate if no reasonable chance exists that further discovery will result in factual support for the nonmoving party. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). Summary disposition may be granted on a breach of contract claim only if the terms of the contract are not subject to more than one reasonable interpretation. *BPS Clinical Laboratories v Blue Cross and Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 700; 552 NW2d 919 (1996). If a contract is subject to two interpretations, factual development is necessary to determine the intent of the parties and summary disposition is inappropriate. *Meagher v Wayne State University*, 222 Mich App 700, 722; 565 NW2d 401 (1997).

While it is clear that summary disposition was granted before discovery was complete, the question whether further discovery would have uncovered factual support for defendant's position, as defendant argues, depends, first, upon whether the employment agreement unambiguously provided for the extension of salary payments sought by plaintiff. We conclude, upon a de novo review, that the trial court did not err in determining that the employment agreement unambiguously provides for these payments if plaintiff was not terminated for cause. Paragraph 4 of the 1994 employment agreement provides that if plaintiff's employment was terminated, for any reason other than cause or his death or disability, he was "entitled to receive, and the Company shall be obligated to pay, his full base salary set forth in paragraph 3 above, for the greater of (i) each year (or fraction thereof) of the remaining term of employment or (ii) one year." Pursuant to the second amendment, plaintiff's term of employment was extended to "a period of four (4) years beginning January 1, 2000 and ending December 31, 2003." Therefore, under the terms of the employment agreement, as amended, plaintiff was entitled to receive his base salary through December 31, 2003, unless the termination of his employment was for cause.

Defendant argues, however, that the first amendment unambiguously provides that any amount received following a change in control is to be set off by money to which plaintiff was entitled under paragraph 4 of the employment agreement. We disagree. Paragraph 17(a) of the first amendment provides that if a change in control occurs during plaintiff's term of employment, "Executive shall be entitled to receive, and the Company shall be obligated to pay" a lump sum payment of $1 million within five business days of the change in control, which "shall be in addition to any salary and compensation paid or payable by the Company or an entity affiliated with the Company and shall not be contingent upon Executive's termination of employment following a Change in Control." Paragraph 17(b) provides that this change in control payment "shall be reduced by any payments to which Executive may be entitled under paragraph 4 of the Employment Agreement regarding a termination of employment." Reading these paragraphs in conjunction with paragraph 4 of the employment agreement, it is apparent that plaintiff was entitled to the entire change in control payment within five business days of the election of a new slate of directors. Because plaintiff's employment was not terminated until approximately two months after the change in control, the first amendment does not provide for a set off as defendant maintains. Under the unambiguous terms of the employment agreement, as

amended, if plaintiff was not terminated for cause, he was entitled to both the change in control payment and his full salary through the end of 1993.

Because defendant argues that it was not provided an opportunity for discovery, we must consider whether additional discovery might have provided support for defendant's argument that plaintiff was terminated for cause. In its counterclaim, defendant does not specifically allege that plaintiff's employment was terminated for cause. However, in defendant's affirmative and special defenses to plaintiff's complaint, defendant alleged that plaintiff "provided cause for termination of his employment" within the contractual meaning of this term, his "employment was terminated consistent with provisions pertaining to termination for cause," and therefore, plaintiff was not entitled to recovery because the corporation had satisfied all of its contractual obligations to plaintiff. When opposing plaintiff's motion for summary disposition, defendant provided no documentary support for its contention that plaintiff was terminated for cause, but asserted that it should be allowed discovery to uncover the fact that plaintiff breached his performance and other obligations, provided cause for termination, and that such evidence could establish that plaintiff's employment was terminated for cause.

As support for its contention that "after-acquired evidence" could support a finding that plaintiff's employment was terminated for cause, defendant relies on *Bradley v Philip Morris, Inc*, 194 Mich App 44; 486 NW2d 48 (1992), vacated in part on other grounds and remanded 440 Mich 870 (1992). However, *Bradley, supra,* is distinguishable because, in that case, the employer had evidence of wrongful conduct when it initially terminated the plaintiffs' employment. This Court stated that, in addition to that evidence, the employer should be allowed to present to the jury any evidence acquired after the termination that the plaintiffs had committed previous misconduct. *Bradley, supra,* does not stand for the proposition that an employer may terminate a person's employment and then only later search for evidence that will support a determination that the termination was for cause. Moreover, as the trial court observed, if we accept defendant's argument that discovery was necessary in order to obtain after-acquired evidence of plaintiff's malfeasance, it logically follows that defendant did not have cause to terminate plaintiff when it did.

We also reject defendant's argument that, pursuant to *Toussaint v Blue Cross & Blue Shield of Michigan,* 408 Mich 579, 621-624; 292 NW2d 880 (1980), the question of whether an individual's employment was terminated for cause must always be submitted to the jury. In *Toussaint, supra,* the majority responded to a statement in the dissenting opinion that the question whether a plaintiff's services were satisfactorily performed is to be determined by the defendant/employer and not by a jury, stating:

> [W]here an employer has agreed to discharge an employee for cause only, its declaration that the employee was discharged for unsatisfactory work is subject to judicial review. The jury as trier of facts decided whether the employee was, in fact, discharged for unsatisfactory work. A promise to terminate employment for cause only would be illusory if the employer were permitted to be the sole judge and final arbiter of the propriety of the discharge. [*Id.* at 621.]

Contrary to what defendant asserts, *Toussaint, supra,* does not stand for the proposition that the question whether an employee has been terminated for cause must always be submitted to a jury. The majority opinion merely states that an employer's statement that cause for termination exists

is reviewable, and, where a case has reached a jury, the issue is properly submitted to the jury. In the present case, defendant did not raise a triable issue of fact regarding whether the termination of plaintiff's employment was for cause, and therefore, is not entitled to a jury determination of this issue.

Defendant also contends that it should be allowed discovery to establish that plaintiff's employment was terminated for cause because MCL 450.1541a(4) provides that an action against a director or officer for failure to perform his statutory duties can be commenced within three years after the cause of action has accrued, or within two years after the time the cause of action is discovered or should reasonably have been discovered, whichever occurs first. However, this limitation period pertains to failure to perform statutory duties, not whether plaintiff's employment was terminated for cause, as that term is defined in the parties' employment agreement.

Defendant further argues that, without discovery, this Court must merely accept plaintiff's self-serving statements in his affidavit that he satisfactorily performed his duties and that there was no cause for his termination. However, defendant had the opportunity, in response to plaintiff's motion, to counter plaintiff's statements by submitting affidavits or documentary evidence of its own to support its position that plaintiff's employment was terminated for cause. Defendant did not do this, but waited until the proceedings on plaintiff's motion to present the affidavit of Paul Gray, who stated that plaintiff's employment was terminated for cause but this was not disclosed to plaintiff at the time. The trial court did not err in dismissing Gray's affidavit, which was not timely under MCR 2.116(G)(1)(a)(ii) (any response to a motion for summary disposition, including affidavits, must be filed and served at least seven days before the hearing) or (G)(4) (when a motion brought under MCR 2.116(C)(10) is supported by affidavits or other documentary evidence, the opposing party must by affidavits or otherwise set forth specific facts showing that there is a genuine issue for trial). See, generally, *Prussing v General Motors Corp*, 403 Mich 366, 370; 269 NW2d 181 (1978).

Defendant also argues that the trial court impermissibly made factual findings when it stated that defendant knew that plaintiff's employment agreement contained certain ramifications depending on whether plaintiff's employment was terminated with or without cause, and defendant should, therefore, have stated its reasons for termination at the time plaintiff's employment was terminated if there was cause for termination. It is apparent that the trial court was merely observing that a sophisticated party to a contract, such as a corporation, could be expected to understand the ramifications of the contract and act accordingly in its own interests. We do not characterize the trial court's statement as an impermissible credibility determination or finding of fact.

Upon a de novo review, none of defendant's arguments regarding the trial court's grant of summary disposition on plaintiff's claim for breach of contract claim or defendant's counterclaims for breach of contract and fiduciary duties demonstrate error requiring reversal of the trial court's order. Additional discovery would not change the unambiguous terms of plaintiff's employment agreement or raise a genuine issue of fact regarding whether defendant terminated plaintiff's employment for cause. Case precedent cited by defendant does not establish that an employer may rely only on after-acquired evidence to establish that a termination of employment was for cause and also does not establish that the issue of cause must always be submitted to the jury. Finally, the trial court did not engage in improper factfinding or

credibility determinations. Thus, the trial court did not err in determining, as a matter of law, that plaintiff's contract unambiguously provided for the extension of contract payments plaintiff requested in his complaint and that defendant had not raised a triable issue of fact regarding its allegations that plaintiff committed a breach of contract or fiduciary duties.

V

Finally, defendant argues that the trial court abused its discretion in denying its motion to amend its pleadings. We disagree. In rejecting defendant's motion, the trial court noted that the only significant change proposed by defendant related to the board of director's approval of the change in control provisions. The trial court found that, although these allegations were not included in defendant's original pleadings, they were all addressed by defendant in response to plaintiff's motion for summary disposition and already considered by the court, and therefore, any amendment to the pleadings would be futile.

The rules pertaining to the amendment of pleadings are designed to facilitate amendment except when prejudice to the opposing party would result. *Amburgey v Sauder*, 238 Mich App 228, 246; 605 NW2d 84 (1999). "Leave to amend may be denied for particularized reasons, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of the amendment." *Amburgey, supra* at 247. An amendment would be futile if, ignoring the substantive merits of the claim, it is legally insufficient on its face. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998).

The trial court did not abuse its discretion in denying defendant's motion for leave to amend its countercomplaint and affirmative defenses. It is not disputed that the challenged amendments to plaintiff's employment agreement were approved and ratified by all of the disinterested directors on defendant's former board. Defendant alleges that the amendments are voidable and not enforceable because the former board approved the amendments in violation of their fiduciary duties to the corporation. However, defendant made this argument in its brief opposing plaintiff's motion for summary disposition, presented no documentary evidence to support this allegation, and the trial court rejected the allegation. On appeal, defendant continues to rely on the unsupported allegations that the amendments were not fair to the corporation when made, and therefore, the former board must have violated its fiduciary duties. The trial court did not abuse its discretion in denying defendant's motion to amend its pleadings to include unsupported allegations regarding the validity of the amendments to the employment agreement, which had already been considered and rejected by the trial court.

Further, the trial court granted summary disposition on the conversion and unjust enrichment counterclaims pursuant to MCR 2.116(C)(8), not (C)(10). No additional facts would support these counterclaims because plaintiff had no obligation to return the exact funds allegedly converted and all other payments were approved by all of the disinterested directors on defendant's former board. Accordingly, the trial court did not abuse its discretion in denying defendant's motion to amend.

Affirmed.

/s/ Richard Allen Griffin
/s/ William B. Murphy
/s/ Kathleen Jansen